No. 3126

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

PETITION FOR REHEARING.

J. BRUCE KREMER,
JAMES E. MURRAY,
Solicitors for Appellant.

W. S. K. BROWN,
Holbrook Building, San Francisco,
Solicitor and of Counsel for Petitioner.

No. 3126

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

PETITION FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the defendant in the above-entitled cause, James A. Murray, and prays that a rehearing be granted in said cause and the decision and opinion of the court recalled because of errors believed to exist therein, upon the grounds and because of the errors hereinafter set out.

The court erred in holding that the conveyance, the subject-matter of this action, was made without consideration and as a gift, and therefore voidable in bankruptcy.

The answer sets up as an affirmative defense that Alec Murray held the property involved, in trust for the appellant. At the trial there was proved, or attempted to be proved, an oral trust, of which the deed in hand was the consummation. That such a trust is valid in law and may be proved seems to have been conceded by this and the court below.

The only evidence with regard to the trust, on either side, is contained in the testimony of the appellant and of James E. Murray, his nephew and attorney (Trans. No. 3126, pp. 54 to 65, and p. 73). This court comments on the feebleness of that part of appellant's testimony, where he stated that he had no particular agreement with the bankrupt at the time the property was originally conveyed, and that there was nothing said about holding the title in trust only some general "understanding" (opinion of Mr. Justice Gilbert, page 3, filed July 1, 1918). The court also referred to Mr. Murray's answer of "Yes, I did not think it needed anything more" in answer to his counsel's leading question, "You " had an oral agreement did you not?"

To support this criticism the court seems to have detached from the corpus of appellant's testimony certain incomplete parts of it, and to have generally disregarded the testimony of James E. Murray, his counsel.

James E. Murray testified (Tr. p. 62): "At the " time it was conveyed to Alec Murray it was with " the understanding as stated by Mr. James A. " Murray, that he was to hold the property for him " and reconvey it to him or to anyone whom he " might name". When we add this to the testimony of appellant and give to the language used its proper weight, we have unqualified evidence, and the only and the whole evidence on the point adduced at the trial, that the conveyance to Alec was made in trust under an agreement to reconvey. Nothing could be clearer or more convincing. What seems to have been the confusing element in this branch of the case was the free use of the word "understanding".

Casually, the term "understanding" appears a loose expression, especially when used with reference to contractual relations; but such is not really the case. Used in such connection, the status of the word has been judicially fixed. The expression is synonomous with "agreement".

Where the word "understood" is used in a deed, in a clause which looks to the benefit of the grantor, the word becomes a synonym of "agreed" (*In re Barkhausen,* 124 N. W. 649, Wis., citing and following *Higginson v. Weld,* Mass., 14 Gray 170, to which latter case we direct the court's especial attention).

An understanding concerning the use of a mule was construed as an agreement in *Holman v. Clark* (41 So. 765, Ala.), and *Mount v. Board, etc.* (80 N.

E. 629, Ind.) and cases therein referred to hold that "understood" and "agreed" are synonymous terms when used with reference to the contractual relations of the parties.

The learned Mr. Justice Paine, in *Kaye v. Crawford* (22 Wis. 320), where an express contract was needed to be shown in order to entitle the plaintiff to recover, made the terms interchangeable by saying:

> The testimony of the plaintiff does not show that the services for which his father gave him the team were rendered in pursuance of any agreement *or understanding* that they were to be paid for. (Italics ours.)

This language was quoted and approved in *Barkow v. Sanger* (3 N. W. 16) where, after quoting Mr. Chief Justice Ryan (Wis.) to the effect that a mutual understanding is the equivalent of an express contract *(Tyler v. Burrington,* 39 Wis. 376-382), it is said (page 22):

> It seems to us that in view of the fact that the learned lexicographer above cited, as well as the justices of this court, have declared the word "understanding", in the connection in which it was used in the question propounded to the jury, as synonymous with "agreement", we would hardly be justified in holding that the jury intended to evade this question by saying there was "no agreement", instead of saying there was "no understanding".

After reviewing the evidence in *Winslow v. Dakota Lumber Company* (20 N. E. 145, Minn.), the court says:

> But we are of opinion nevertheless, that there is evidence in the case fairly tending to show that the goods were furnished to Thompson by plaintiffs upon an understanding between them and defendant that the latter should pay for them. We use the word "understanding" as expressing a valid contract engagement, but one of a somewhat informal character.

In *Bullock v. Johnson* (35 S. E. 705, Ga.) it is held that, when a witness speaking with reference to a contract between himself and another stated there was a certain "understanding", the evidence tends to show that this was what was mutually agreed upon by the parties.

Where a witness is asked whether he had any understanding concerning certain contractual relations in issue, it was held that the word as used called for facts as to the *agreement* between the parties, if any, and that the term was practically synonomous with "agreement" *(Garrett v. Western Union etc., Iowa,* 58 N. W. 1064).

It was held in *Fraser v. Davie* (11 S. C. 56, p. 68), that the word "understood", used by a witness with reference to his own apprehension of an agreement to which he was a party, was used in the sense of "agreement", and *was direct proof of what the agreement was.*

If complaint be made that the appellant testified as to the oral agreement under the lead of his attorney, then we ask the court to remember that it was this same attorney who drafted the original

instrument and who was conversant with the matters attendant upon its delivery (Tr. pp. 61-65), and who very naturally sought to have the exact facts in the record. The whole tenor of appellant's testimony shows a man given over to general expressions—an indulgence which now arises to confront him. Under the circumstances, the leading by his counsel was justifiable, if not necessary.

The court erred in considering as evidentiary matter the opinion in *City of Pocatello v. Murray* (23 Idaho 444) and the affidavits and other matters mentioned in that case, as those matters were not a part of the record herein.

The entire case seems to have pivoted upon the contents of certain instruments mentioned in the report of the case above referred to. It appears from that opinion that one Alec Murray made affidavit of ownership of certain real property situate in Pocatello, known as the "Auditorium", which had been conveyed to him by one James A. Murray; this affidavit seems to have been appended to the answer of James A. Murray, in which he alleged that one Winter and Alec Murray were the joint owners of the Auditorium. Neither this answer nor the affidavit mentioned are in evidence here, nor are any other of the records of that cause. The only mention of the matter to be found in the record here is at page 65 of the Transcript, where Mr. Stephens, the attorney for the appellee, made the following remark:

> Mr. Stephens. In connection with the testimony of James A. Murray, I desire to call the court's attention to the suit of the City of Pocatello vs. James A. Murray, and especially that part of the opinion of the court found upon page 453, touching the affidavits of Alec Murray and James A. Murray, and at the bottom of page 464, relative to the ownership of the Auditorium Theatre in Pocatello.

It is to be noted that the court is not directed even to the volume in which the decision is reported.

Mr. Justice Gilbert, after referring to this decision, says in his opinion (filed herein July 1, 1918):

> The appellant in his answer to the order to show cause alleged that Winter and the bankrupt were residents and taxpayers of the City of Pocatello, and that they were joint owners in fee simple of the property so conveyed, and his answer was accompanied by the affidavit of the bankrupt, in which the latter stated that he owned an undivided one-half interest in the Auditorium property in fee simple, and that he had paid the taxes thereon assessed for the year 1912. A similar affidavit made by Winter accompanied the answer. The court in that proceeding found that the facts so alleged in the answer were "clearly supported by the evidence". * * * Here the appellant and the bankrupt have by answer and affidavit deposed that the conveyance to the bankrupt was a grant of an estate in fee simple, an estate which is the highest known to the law, and which necessarily implies absolute dominion over the land.

Under no rule of law can the matters which the court has thus given such weight be considered as evidence in the case at bar.

Section 5974 of the Idaho Revised Codes states the manner in which a judicial record may be proved:

> Sec. 5974: A judicial record of this State, or of the United States, may be proved by the production of the original or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court

annexed, if there be a clerk and seal, together with a certificate of the Chief Judge or presiding Magistrate, that the attestation is in due form.

Section 5977, of the same codes, after enumerating certain matters not pertinent here, provides:

Sec. 5977: Other official documents may be proved as follows:

6. Documents of any other class in this State by the original, or by a copy, certified by the legal keeper thereof.

With regard to the copies of instruments, Section 5982 provides:

Sec. 5982: Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance, that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be a clerk of a court having a seal, under the seal of such court.

Section 5999 prescribes the rule where the document itself is not produced:

Sec. 5999: There can be no evidence of the contents of a writing other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded and a certified copy of the record is made evidence by this code or other statutes;

5. When the original consists of numerous accounts or other documents which cannot be examined in court without a great loss of time, and the evidence sought from them is only the general result of the whole;

In the cases mentioned in subdivisions three and four a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

It is plain that the provisions of none of these statutes was complied with in bringing any part of the record in *Pocatello v. Murray* before the trial court. Under Federal enactments that record is removed still further from the eye of the court.

Section 1519 of the compiled statutes (R. S. 905) provides:

1519. (R. S. 905) Authentication of legislative acts and proof of judicial proceedings of State, etc.

The acts of the legislature of any State or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or pre-

> siding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the court of the State from which they are taken.

By the enactment of this section Congress exercised the power conferred upon it by the full faith and credit clause of the Constitution (Const. Art. IV, Sec. I), established a rule of evidence (*Wisconsin v. Pelican Ins. Co. etc.,* 127 U. S. 265, 32 L. Ed. 239), and prescribed the manner in which judicial proceedings shall be proved (*Turnbull v. Payson,* 95 U. S. 418-422, 24 Law. Ed. 437; *Wittemore v. Malcomson,* (C. C., 28 Fed. 605).

In *Pacific R. R. etc. v. Missouri Pacific Ry.* (111 U. S. 505, 4 Sup. Ct. 583, 28 Law. Ed. 498) counsel asked leave to refer to the records of another case reposing in the United States Circuit Court to show the collusive and fraudulent character of certain legal and other proceedings pertinent to and touching the matters litigated in the principal case. The Supreme Court refused cnosideration of these matters, saying:

> There is not, in the record on this appeal, any stipulation that the Ketchum record be considered as a part of the bill, nor is it identified in any way. It is no part of the transcript certified from the Circuit Court. The clerk of that court certifies that what is before us is "A true transcript of the record in case No. 1677, of *Pacific Railroad* (of Missouri), plaintiff, against *Missouri Pacific Railway et*

> *al.,* defendants, as fully as the same remain on file and of record in said case in my office." It follows, that the record in the *Ketchum Case* was never made part of the record in this case so far as appears from the only record which is before this court, on this appeal. In regard to the bill in the Ketchum suit, and the decree, and the master's deed, and the order approving the deed, they are made a part of the bill in this suit, and identified by the annexing of copies. But the statement in the bill that the plaintiff prays liberty to refer to the files and records of the Circuit Court in the Ketchum suit, to show such and such things, can be of no force or effect to allow either party to claim, in this court, the right to produce or refer to anything, as answering the description of such files and records, which it may assert to be such, or as being what the Circuit Court considered as before it. One of the assignments of error, on this appeal, is that the Circuit Court considered matters outside of the record, and matters not embraced in the bill. We are of opinion that this court cannot consider anything which is not contained in the bill, and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and record of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill.

In re Manderson (51 Fed. 501) the Circuit Court of Appeals of the Third Circuit spoke of the rule as follows:

> Counsel for the Government have requested us to take judicial notice of certain proceedings had in the court below and in the United States Circuit Court for the Eastern District of Pennsylvania for the condemnation of other

lands than those described in the petition, and which belonged to some of these same respondents; but as those proceedings formed no part of the record, they cannot be allowed to affect the present inquiry.

State courts have held to the rule:

Bank of Montreal v. Taylor, 86 Ill. App. 388;
Gibson v. Buckner, 44 S. W. 1034 (Ark.);
Bond v. White, 24 Kans. 45;
Thayer v. Honeywell, 51 P. 929;
Anderson v. Cecil, 38 Atl. 1074 (Md.);
Allison v. Fidelity, 104 N. W. 753 (Neb.);
Lyon v. Bolling, 14 Ala. 753;
Grace v. Ballou, 56 N. W. 1075 (S. D.).

When we stop to consider that the record of a judgment offered in evidence may be contradicted as to the facts necessary to give the court jurisdiction, both as to subject matter and person (*Wisconsin v. Pelican &c., supra; Grover and Baker Sewing Machine Co. v. Radcliffe,* 11 Sup. Ct. 92-94, 137 U. S. 287, 34 L. Ed. 239; *Thompson v. Whitman,* 18 Wall. 457, 21 L. Ed. 897, a leading case); that the jurisdiction of a state court to render judgment is always open to collateral attack in foreign courts, and in this respect federal and state courts are foreign to each other, though sitting in the same state (*Phoenix Bridge Co. v. Castleberry,* 131 Fed. 175; 65 C. C. A. 481; *Cooper v. Brazelton,* 135 Fed. 476; 68 C. C. A. 188; *Hekking v. Pfaff,* 91 Fed. 60 affirming 82 Fed. 403), and that jurisdictional or other defects might well exist in *Pocatello v. Murray*

so far as this court is informed, we have added and controlling reasons for the support of the rule.

We concede at this point the right of the federal court to look to the statutes and precedents of a state as evidence of the *law* of a state, but this concession does not embrace the right to examine the *facts* involved in such precedents without due proof of their existence.

For fear that this court may lean to the view that it has power to judicially notice the matter set out in *Pocatello v. Murray,* we redirect attention to *Pacific R. R. etc. v. Missouri Pacific Ry.* and *In re Manderson (supra).*

It would therefore appear that the court, as a matter of law being ignorant in the premises, has *assumed* that the Alec Murray mentioned in *Pocatello v. Murray* is the bankrupt here, that the Auditorium there is the Auditorium here, that the James A. Murray there is the Murray here, and that the affidavits mentioned in the opinion were really made and properly filed in a court having jurisdiction and contained the statements credited to them—though, in fact and in law, there is not now before the court proof of any of these things. No doubt the Murrays there are the Murrays here, and that the identity of the property is complete—it would be strange if such were not the case. But this is likewise only an assumption, and cannot supply the lack of evidence. Upon the new trial we are seeking this deficiency may be remedied.

Meantime we are asking that our property be not taken from us by means of presumptions, but that we be permitted to meet the evidence which seeks to take it from us and to explain and rebut it if we can—otherwise, the process by which it is taken cannot be due.

By reason of these manifest errors, and upon the grounds we have set forth, it is respectfully urged that a rehearing be granted herein, that the opinion heretofore filed be withdrawn, and that the judgment herein be reversed.

Dated, San Francisco,
July 29, 1918.

J. Bruce Kremer,
James E. Murray,
Solicitors for Appellant and Petitioner.

W. S. K. Brown,
Solicitor and of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law, and that said petition is not interposed for delay.

W. S. K. Brown,
Of Counsel for Appellant and Petitioner.